Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-379 OF 1989
JEMURI SERJAN CJ (BORNEO), HARUN HASHIM AND AJAIB SINGH SCJJ
1 OCTOBER 1992

Civil Procedure *— Injunction — Interim injunction set aside by lower court — Appeal — Relevant matters in granting interim injunction*

Companies and Corporations *— Directors — Removal of directors — Notice under articles of association requiring director to resign his office — Director failing to do so and interfering in affairs of companies — Applicability of s 128(2) of Companies Act to removal of directors under articles of association — Companies Act 1965 s 128(2)*

The appellants (plaintiffs) applied by originating summons for a declaration that the respondent (defendant) had vacated the office of director of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd and by another originating summons for an order that the respondent be restrained from acting or holding himself out as director of the two companies. A majority of the shareholders of the companies had pursuant to art 85(f) of the articles of association required the respondent to vacate his office. The High Court judge had on the application of the appellants issued an interim injunction to restrain the respondent from acting or holding himself out as executive director or chairman of the companies. The respondent applied to set aside the order. The learned judge allowed the application of the respondent. He held that the removal of the directors was governed by s 128 of the Companies Act 1965 ('the Act') under which special notice was required of any resolution to remove a director. He dismissed the appellants' application on the ground of non-disclosure by the appellants that such special notice was never given to the respondent. The appellants appealed.

Held, allowing the appeal:

(1) The hearing before the learned judge was only an application for an interim injunction and the learned judge should not have dealt with the application in such a manner as to give the impression in his judgment that he had in fact disposed of the originating summons itself on the merits based on the affidavits of the parties to the action.

(2) In an application for an interim injunction the court is not called upon to make any final decision on any question of fact. What is required at that stage is for the learned judge to decide on the affidavits available before him that the claim in the originating summons is not frivolous or vexations, in other words that there is a serious question to be tried, and having so decided he must go on to consider the question of balance of convenience.

(3) In this case, the learned judge had given weight to irrelevant considerations not in any way connected with the application and had plainly and erroneously given no weight to relevant considerations.

(4) The respondent had vacated the office of director of the companies when the notice under art 85(f) of the articles of association was sent to him. It was vital for the board of directors to ensure that the respondent did not interfere with their efforts to resolve the problems of the companies. These were the grounds upon which the appellants applied for the interim injunction. These were the relevant matters which the court ought to have taken into consideration in dealing with the question whether to give or refuse the interim injunction and all other matters referred to in the affidavits of both parties to the application not intended to be used in the application should be disregarded.

(5) In this case the majority of the directors had pursuant to art 85(f) of the articles of association required the respondent to vacate his office as director of the companies and there must be some truth in the appellant's allegation of the respondent's interference with the conduct of the affairs of the companies. Section 128(2) of the Act does not apply to the removal of a director by notice under art 85(f) under which the respondent was required to vacate his office as director but may apply to cases where the director is removed by a company by a resolution of the company.

(6) There were serious questions to be tried in this case and the balance of convenience was weighted in favour of the grant of the injunction. The appeal should therefore be allowed and an order made in terms of the application.

[Bahasa Malaysia summary

Perayu (plaintif) telah memohon melalui saman pemula untuk mendapat deklarasi bahawa penentang (defendan) telah mengosongkan jawatannya sebagai pengarah Tien Ik Enterprises Sdn Bhd dan Tien Ik Credit Sdn Bhd dan melalui suatu saman pemula yang lain untuk mendapat perintah supaya penentang ditahan dari bertindak atau mengemukakan dirinya sebagai pengarah kedua-dua syarikat itu. Majoriti pemegang saham syarikat-syarikat itu telah menghendaki penentang mengosongkan jawatannya mengikut perkara 85(f) perkara-perkara persatuan. Hakim perbicaraan yang arif atas permohonan perayu telah mengeluarkan suatu injunksi interim menghalang penentang dari bertindak atau mengemukakan dirinya sebagai pengarah eksekutif atau pengerusi syarikat-syarikat itu. Penentang telah memohon supaya perintah itu diketepikan. Hakim yang arif telah membenarkan permohonan penentang itu. Beliau memutuskan bahawa penyingkiran pengarah ditentukan oleh s 128 Akta Syarikat 1965 ('Akta itu') di mana notis khas diperlukan bagi mana-mana resolusi untuk menyingkirkan seseorang pengarah. Beliau telah menolak per-

mohonan perayu atas alasan bahawa perayu tidak mendedahkan yang notis khas seperti itu tidak diberi kepada penentang. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Pembicaraan di hadapan hakim yang arif itu hanyalah permohonan untuk mendapat injunksi interim dan hakim yang arif itu tidak seharusnya membicarakan permohonan itu sebegitu supaya memberikan tanggapan di dalam penghakimannya bahawa beliau sebenarnya telah menyelesaikan saman pemula itu atas meritnya berdasarkan afidavit-afidavit pihak-pihak dalam tuntutan itu.

(2) Di dalam sesuatu permohonan untuk mendapat suatu injunksi interim mahkamah tidak diminta membuat sebarang keputusan muktamad mengenai apa-apa soal fakta. Apa yang diperlukan di peringkat itu ialah untuk hakim yang arif itu memutuskan berdasarkan afidavit-afidavit yang ada di hadapan beliau bahawa tuntutan di dalam saman pemula itu bukan sia-sia atau menyusahkan, dengan perkataan lain terdapat suatu soalan serius untuk dibicarakan, dan selepas memutuskan demikian beliau hendaklah menimbangkan soalan imbangan kesesuaian.

(3) Di dalam kes ini hakim yang arif telah mementingkan pertimbangan-pertimbangan yang tidak relevan yang tidak sama sekali berkaitan dengan permohonan itu dan beliau, dengan jelas dan salah, tidak memberi kepentingan kepada pertimbangan-pertimbangan yang relevan.

(4) Penentang telah mengosongkan jawatan pengarah syarikat-syarikat itu apabila notis di bawah perkara 85(f) perkara-perkara persatuan telah dihantar kepadanya. Adalah penting bagi lembaga pengarah memastikan bahawa penentang tidak masuk campur dalam usaha mereka untuk menyelesaikan masalah-masalah syarikat-syarikat itu. Inilah alasan-alasan atas mana perayu memohon injunksi interim itu. Ini jugalah perkara-perkara yang relevan yang mahkamah seharusnya mengambil kira apabila membicarakan soalan sama ada untuk memberi atau menolak injunksi interim itu dan semua perkara lain yang disebut di dalam afidavit-afidavit kedua-dua pihak permohonan itu yang tidak dimaksud digunakan di dalam permohonan itu seharusnya tidak dipedulikan.

(5) Di dalam kes ini majoriti dari pengarah-pengarah, dengan mengikut perkara 85(f) perkara-perkara persatuan itu telah menghendaki penentang mengosongkan jawatannya sebagai pengarah syarikat-syarikat itu dan tentunya ada kebenaran sedikit sebanyak dalam apa yang dikatakan oleh perayu tentang masuk campur penentang dalam pengendalian urusan-urusan syarikat-syarikat itu. Seksyen 128(2) Akta itu tidak terpakai kepada penyingkiran seseorang pengarah melalui notis di bawah perkara 85(f) di bawah mana penentang dikehendaki mengosongkan jawatannya sebagai pengarah tetapi ia boleh terpakai kepada kes-kes di mana pengarah itu disingkir oleh sebuah syarikat dengan resolusi syarikat itu.

(6) Terdapat soalan-soalan serius yang perlu dibicarakan di dalam kes ini dan imbangan kesesuaian adalah berat menyebelahi pemberian injunksi itu. Rayuan itu sepatutnya dibenarkan dan suatu perintah dibuat seperti yang dikehendaki dalam permohonan itu.]

Cases referred to

1 *Sari Artists Film Productions Sdn Bhd v Malaysia Film Industries Sdn Bhd* [1974] 1 MLJ 123 (refd)
2 *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 654 (folld)
3 *Osenton (Charles) & Co v Johnston* [1942] AC 130 (folld)
4 *Hadmor Productions v Hamilton* [1983] 1 AC 191; [1982] 2 WLR 322 (refd)
5 *American Cyanamid v Ethicon* [1975] AC 396; [1975] 1 All ER 504 (folld)
6 *Lee v Chou Wen Hsein & Ors* [1985] BCLC 45 (refd)
7 *Cayne v Global Resources plc* [1984] 1 All ER 225 (distd)
8 *Solaiappan v Lim Yoke Fan* [1968] 2 MLJ 21 (refd)

Legislation referred to

Companies Act 1967 s 128(2)

Appeal from: Originating Summons No D1–24–121–89 (High Court, Kuala Lumpur)

M Nagarajah (*Shook Lin & Bok*) for the appellants.
Liza Chan (*Yip Yeo & Nasrim*) for the respondent.

Cur Adv Vult

Jemuri Serjan CJ (Borneo) (delivering the judgment of the court): The plaintiffs (appellants before us) took out an Originating Summons No D1–24–121–89 on 21 April 1989 seeking the following reliefs:

(a) A declaration that the defendant (respondent before us) has vacated the office of director of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd with effect from 23 March 1989.
(b) An order that the defendant be restrained forthwith from acting or holding himself out as the director of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd.
(c) An order that the defendant forthwith do and concur in doing all acts and things necessary to enable the plaintiffs to obtain possession of and control over the books, documents, cash and other property of the said companies on behalf of the said companies.
(d) Consequential orders as to costs.

On the same day the plaintiffs by summons-in-chambers applied under this originating summons to the High Court for the following orders:

(a) that the defendant be restrained from acting or holding himself out *as a director of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd*

pending the disposal of Originating Summons No D1–24–121–89 and from otherwise intermeddling in the said companies' business or the management of its affairs (emphasis added);

(b) that the defendant forthwith do and concur in doing all acts and things necessary to enable the plaintiffs to obtain possession of and control over its books, documents, cash and other property on behalf of the said companies;

(c) costs.

This application was supported by two affidavits, one affirmed by David Kuok Khoon Hin on 21 May 1989 and the other by Irene Kuok on 10 May 1989 and the three affidavits of Nagarajah Muttiah and opposed by the defendant by two affidavits affirmed by himself dated 29 April 1989 and 11 May 1989.

This application was, however, heard together with two other applications in relation to Originating Summons No D1–24–41–89 dated 23 February 1989 and Petition No D1–26–9–89 dated 31 March 1989. It would appear that the learned judge took the view that all the applications under the two originating summons and the petition were inter-related and decided to hear all the applications together.

In order to understand this appeal it is pertinent to give the background of this appeal and the sequence of events preceding the appeal. On 23 February 1989 Helen Kuok, Irene Kuok, David Kuok Khoon Hin and Bernard Kuok Meng Wah as plaintiffs filed Originating Summons No D1–24–41–89 seeking the following:

(a) A declaration that upon a true construction of the emergency meeting of the directors of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd held on 31 January 1989.

(b) A declaration that the defendant has ceased forthwith from 31 January 1989 to be the chairman and executive director of Tien Ik Enterprises Sdn Bhd and as the chairman of Tien Ik Credit Sdn Bhd.

(c) An order that the defendant be restrained forthwith from acting or holding himself out as the executive director and/or chairman of Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd, Tien Ik Sdn Bhd and Giltspur Holdings Sdn Bhd (hereinafter referred to as the 'said companies').

(d) An order that the defendant be restrained forthwith from managing the affairs of the said companies as their executive director and/or the chairman of the said companies.

(e) An order that the defendant forthwith do and concur in doing all acts and things necessary to enable the plaintiffs to obtain possession of and control over the books, documents, cash and other property of the said companies on behalf of the said companies.

In this action Peter Kuok Khoon Hwong was cited as defendant. After filing the originating summons, the plaintiffs by summons-in-chambers dated 23 February 1989 applied under this originating summons for the following orders:

(a) that the defendant be restrained from acting or holding himself out *as executive director and/or chairman of Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd, Tien Ik Sdn Bhd and Giltspur Holdings Sdn Bhd* and from otherwise,

intermeddling in the said companies' business or the management of its affairs (emphasis added);

(b) that the defendant forthwith do and concur in doing all acts and things necessary to enable the plaintiffs to obtain possession of and control over its books, documents, cash and other property on behalf of the said companies; and

(c) order as to costs.

On 27 February 1989 the High Court granted an interim injunction in terms of para (a) of the summons-in-chambers with the further order that the defendant be at liberty to apply to set it aside, but no order was made in respect of para (b) of the prayer. Hence, on 3 March 1989 the defendant filed an application by summons-in-chambers applying to set it aside. On 5 September 1989 the learned judge delivered his written judgment allowing the defendant's application to set aside this interim injunction and in the same judgment the learned judge dismissed the plaintiffs' application for an order that the defendant forthwith do and concur in doing all acts and things necessary to enable the plaintiffs to obtain possession of and control over its books, documents, cash and other property on behalf of the said companies, namely, prayer (b) that was stood down at the hearing on 27 February 1989.

On 31 March 1989 the defendant together with Woodsville Sdn Bhd filed Petition No D1–26–9–89 making Tien Ik Enterprises Sdn Bhd, David Kuok Khoon Hin, Irene Kuok, Helen Kuok and Bernard Kuok as respondents and seeking the following:

(a) a declaration that all the meetings and resolutions referred to in paras 39–45 are void and of no effect;

(b) an order that the company as manager of the Kuok Group do direct Deliotte Haskins & Sells to proceed with the audit of the companies in Hong Kong and to produce the trust account of the Peduka Trust;

(c) an order that a firm of auditors be appointed by the court to audit the accounts of the Malaysian companies;

(d) an order that a valuation be made of the assets of the company and the Kuok Group;

(e) an order that the second to fifth respondents do purchase the shares in the company and the Kuok Group belonging to your petitioner at a value to be determined by the aforesaid auditors in Hong Kong and in Malaysia;

(f) alternatively, an order that the respondent do cause the company and the Kuok Group to purchase the shares of your petitioner on the same terms aforesaid and a consequential order that the capital of the company and the Kuok Group be reduced accordingly;

(g) an order that pending the purchase of your petitioner's shares, the respondent be restrained from holding any meeting, whether as shareholders or as directors, of the company or the Kuok Group without proper notice to Peter Kuok or your petitioner and from passing any resolution in any such meetings without Peter Kuok or your petitioner's approval;

(h) costs; and

(i) such further or other order as this honourable court may deem fit and just.

Strangely enough and inexplicably, considering that Petition No D1–26–9–89 was only filed on 31 March 1989, on 3 March 1989 the petitioners, namely, Peter Kuok Khoon Hwong and Woodsville Sdn Bhd in Petition

No D1–26–9–89, filed an ex parte summons-in-chambers applying for an interim injunction in the following terms:

(a) that the respondents and each of them whether by themselves, their servants and/or agents or any of them or otherwise howsoever be restrained until further order from doing the following acts or any of them that is to say:

(i) acting or purporting to act or continuing to act in pursuance of all resolutions allegedly passed by the board of directors or shareholders in general meeting of Tien Ik Enterprises Sdn Bhd ... Tien Ik Credit Sdn Bhd ... Tien Ik Sdn Bhd ... Giltspur Holdings Sdn Bhd ... Bimelec Corporation Ltd ... K-Rex Holdings Ltd ... K-Rex Enterprises Ltd ... K-Rex Insurance Ltd ... Worldport Trading Ltd ... and all other companies in which the first petitioner, Peter Kuok Khoon Hwong is a director or the second petitioner, Woodsville Sdn Bhd is a shareholder (hereinafter referred to as 'the Kuok group of companies') from 27 December 1988 to the date of this order;

(ii) calling, convening or holding any director's or shareholder's meeting in respect of the Kuok group of companies without proper notice being given to the first petitioner or the second petitioner;

(iii) passing any resolution or make any determination in any such meetings aforesaid without the approval of the first petitioner or the second petitioner.

(b) costs of this application be costs in the cause.

On 6 March 1989 the learned judge granted the ex parte interim injunction in terms of prayers (i) and (ii) of the application. The argument in respect of prayer (iii) was held over as the learned judge decided to hear it inter parte. Consequent upon the grant of this interim injunction the plaintiffs by summons-in-chambers dated 28 March 1989 bearing the number of this petition, (see p 53 of Vol One of the record of appeal) applied to the High Court to set it aside. The plaintiffs' application was heard together with prayer (iii) of the ex parte application referred to earlier but it was dismissed. (See p 83.) Prayer (iii) of the defendant's application dated 3 March 1989 was similarly dismissed. These two matters were dealt with by the learned judge in his judgment dated 5 September 1989. (See pp 79–84 of Vol One of the record of appeal.)

Three separate judgments were handed down on the same day, ie 5 September 1989, in respect of each of the applications. In respect of the application dated 21 April 1989 for an interim injunction under Originating Summons No D1–24–121–89 with which we are concerned here, the learned judge dismissed the application resulting in the order dated 5 September 1989 which is the subject of an appeal before us. The draft order dated 5 September 1989 is as follows:

Order

This application coming on for hearing on 10 and 11 May 1989, 22 June 1989, 17 and 18 July 1989 in the presence of Mr Nagarajah Muttiah of counsel for the plaintiffs and Miss Liza Chan of counsel for the defendant and upon reading the summons-in-chambers dated 21 April 1989, the two affidavits of David Kuok Khoon Hin affirmed on 21 and 29 April 1989, the three affidavits of Nagarajah Muttiah affirmed on 21 and 25 April 1989 and 25 May 1989 and the affidavit of

Irene Kuok affirmed on 10 May 1989 and the two affidavits of Peter Kuok Khoon Hwong affirmed on 29 April 1989 and on 11 May 1989 and the notice of intention to use affidavit dated 11 May 1989 and all filed herein and upon hearing counsel aforesaid it was ordered that this application do stand adjourned for judgment and the same coming on for judgment this day in the presence of Mr Nagarajah Muttiah of counsel for the plaintiffs and Miss Liza Chan of counsel for the defendant it is ordered that this application be and is hereby dismissed with costs and it is ordered that the plaintiffs be and are hereby granted leave to appeal to the Supreme Court.

Dated 5 September 1989.

In dismissing the application the learned judge gave his reasons in the following words after stating the order sought in the application:

The issues arising in this case are the same as the issues found in the case of OS 24–41–89 where the parties involved are from the same family.

I would adopt the grounds in the judgment given by me in that case and for the same reason would dismiss this application with costs. (Emphasis added.)

Dated 5 September 1989.

In view of the proliferation of the actions and the applications thereunder and the consequent orders ensuing necessarily therefrom, it is necessary to look at and examine the judgment in respect of the application under Originating Summons No D1–24–41–89 to ascertain whether the learned judge had reached the right conclusion on the materials before him in rejecting the application for the interim injunction.

The relevant parts of the grounds of judgment in the application under Originating Summons No D1–24–41–89 for the sake of convenience is hereby reproduced:

ORIGINATING SUMMONS NO D1–24–41–89

Between

1 Helen Kuok
2 Irene Kuok
3 David Kuok Khoon Hin
4 Bernard Kuok Meng Wah ... Plaintiffs

And

Peter Kuok Khoon Hwong ... Defendant

Grounds of judgment

This is an application by the plaintiffs (encl 20) for an order that the order of the court dated 6 March 1989 (encl 16) be set aside.

Briefly the events that took place is this.

1 By an ex parte application the plaintiffs obtained an order dated 27 February 1989 for an interim injunction (encl 9) against the defendant restraining the defendant from acting or holding himself out as executive director and/or chairman of Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd, Tien Ik Sdn Bhd and Giltspur Holdings Sdn Bhd ('the said companies') and from otherwise intermeddling in the said companies business or management of its affairs.

2 By an ex parte application (encl 12) by way of summons-in-chambers the defendant was granted an order (encl 16) that the injunction granted on 27 February 1989 be suspended pending application by the defendant to set aside the same.

3 The plaintiffs now apply to court (encl 20) for an order that the order dated 6 March 1989 be set aside.

4 The defendant has also filed an application (encl 19) to set aside the order dated 27 February 1989 granted to the plaintiffs.

...

The companies involved in this case are Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd, Tien Ik Sdn Bhd and Giltspur Holdings Sdn Bhd.

The plaintiffs' claim against the defendant is for a declaration that the defendant has ceased as from 31 January 1989 to be the chairman and executive director of Tien Ik Enterprises Sdn Bhd and as the chairman of Tien Ik Credit Sdn Bhd. The other prayers are consequential orders to restrain the defendant from acting or holding himself out as the executive director and/or chairman of Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd, Tien Ik Sdn Bhd and Giltspur Holdings Sdn Bhd.

The plaintiffs' application is supported by the affidavit (encl 2) of David Kuok Khoon Hin. In his affidavit, David stated that the defendant has been, at all material times the chairman and executive director of Tien Ik Enterprises Sdn Bhd which also manages Tien Ik Credit Sdn Bhd, Tien Ik Sdn Bhd and Giltspur Holdings Sdn Bhd. The defendant was also the chairman and non-executive director of Tien Ik Credit Sdn Bhd.

David further stated in his affidavit that on 20 December 1988, the second plaintiff issued notices of meetings of the board of directors of Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd and Tien Ik Sdn Bhd pursuant to arts 89 and 94 of the articles of association relevant to the particular company setting out five separate items on the agenda. The defendant failed to attend the meetings. He in fact replied that he would not attend any of the meetings. The meetings were however held in his absence on 27 December 1988, 28 December 1988 and 29 December 1988.

On 30 December 1988 the directors of Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd and Tien Ik Sdn Bhd held another emergency meeting to review the authorized bank signatories to the various accounts operated by the companies. But the resolution could not be effected by the bank because now there is a dispute between the plaintiffs and the defendant.

David further stated in his affidavit that the minutes of the meetings held on 27 December 1888, 28 December 1988, and 29 December 1988 were sent to the defendant but the defendant failed to comply with the resolutions passed at the meetings.

As a consequence, the board of directors held a meeting on 31 January 1989 of Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd, and Tien Ik Sdn Bhd and passed a resolution that the defendant ceases to be the chairman and/or executive director of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd.

Subsequently on 3 February 1989 notices were sent calling for yet another EGM of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd to remove the defendant as a director of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd.

Those are the relevant facts that I could gather from the affidavit.

In answer to the plaintiffs' allegation, the defendant has denied the claim and raised a number of legal objections.

As regards the EGM called to remove him as a director of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd it is bad in law and not valid. The

defendant contended that the notices are bad because they do not comply with the provisions of the articles of association of the companies, or the Companies Act. Furthermore, the defendant contended that he has no notice of the meetings given to him.

Having read the affidavits of both the plaintiffs and the defendant and having heard arguments of both learned counsel for the plaintiffs and the defendant, I can narrow down the issues without labouring to deal with facts or issues which to my mind are not relevant.

The first question that comes to my mind is whether the defendant has ceased to be the executive director of the companies as claimed by the plaintiffs.

It is common ground that the basis upon which the plaintiffs rely in claiming that the defendant has ceased to be the executive director of the companies is the resolutions passed by the board of directors at the emergency meetings held on 31 January 1989.

The meetings were held in the absence of the defendant. The defendant also alleged that he was never informed of the meetings. This allegation has never been denied by the plaintiffs. The defendant contended that the meetings are therefore bad in law and not valid. Consequently the resolution passed at the meetings is also not valid.

Removal of directors is governed by s 128 of the Companies Act 1965 ('the Act'). Under the provision special notice is required of any resolution to remove a director. In the present case no such notice was given as required under s 128 of the Act. The meeting is therefore bad in law and the resolution would not be valid. The purported resolution to remove the defendant as the executive director is not valid and has no effect.

The second issue which I consider important is the question of non-disclosure of material facts. The material facts which the plaintiffs failed to disclose when applying for the order of injunction against the defendant is that the defendant was never given notice of the meetings held on 31 January 1989. The non-disclosure of the material facts would entitle the defendant to set aside the order. (*Sari Artists Film Productions Sdn Bhd v Malaysia Film Industries Sdn Bhd.*[1])

On these grounds I would allow the defendant's application (encl 19) and set aside the order given on 27 February 1989.

As regards prayer (b) of the plaintiffs' application in encl (3) the plaintiffs have asked for an order that the defendant forthwith do and concur in doing all acts and things necessary to enable the plaintiffs to obtain possession of and control over its books, documents, cash and other property on behalf of the said companies.

The same arguments would apply to this application. As the resolution passed at the meetings was not valid the plaintiffs cannot impose the resolution on the defendant. I think the status quo should be maintained. To my mind the balance of convenience is in favour of the defendant that the status quo be maintained. As the defendant is still the director and executive chairman of the companies he should be allowed to continue in the management of the companies until the dispute between the parties regarding them is settled.

In the event I would dismiss the plaintiffs' application of prayer (b) in encl (3).

...

The introductory paragraph of this judgment is misleading and confusing, adding to the difficulty in comprehending its necessity in the judgment because it has no place in the judgment. This judgment is not in fact dealing with the plaintiffs' (Helen Kuok, Irene Kuok, David Kuok Khoon Hin and Bernard Kuok Meng Wah) application for an order to set aside the order of

the court dated 6 March 1989 as was made out by the learned judge in the introduction to his judgment but an application by the defendant to set aside the interim injunction granted to the plaintiffs on 27 February 1989 where the learned judge also ordered that the defendant was at liberty to set it aside. The plaintiffs' application to set aside the order of the court dated 6 March 1989 was dealt with together by the learned judge in his judgment in respect of the application of Peter Kuok Khoon Hwong and Woodsville Sdn Bhd as petitioners in Petition No D1–26–9–89 (see p 77 of Vol One of the record of appeal) for an interim injunction to restrain Tien Ik Enterprises Sdn Bhd, David Kuok Khoon Hin, Irene Kuok, Helen Kuok and Bernard Kuok Meng Wah as respondents from passing any resolution or making any determination in any such meetings without the approval of the first petitioner and the second petitioner but both applications were dismissed. The judgment is at pp 79–84 of Vol One of the record of appeal. Thus, to refer this matter in another judgment on a separate application altogether contributes to a large measure to the confusion. The second penultimate paragraph of this judgment also needs clarification because there is no reference to this particular application (prayer (b)), in the introductory part of the judgment. In this paragraph the learned judge was dealing with the application made under Originating Summons No D1–24–41–89 dated 23 February 1989 referred to earlier on and in particular to prayer (b) of the application, namely:

> that the defendant forthwith do and concur in doing all acts and things necessary to enable the plaintiffs to obtain possession of and control over its books, documents, cash and other property on behalf of the said companies.

It may be recalled that when the learned judge dealt with the application dated 23 February 1989 he granted the interim injunction but did not dispose of prayer (b) at that hearing. However, submission on this prayer was heard together with the application to set aside the order given on 27 February 1989. This explains why the judgment made a reference to prayer (b) of the plaintiffs' application.

In our view, the relevant parts of this judgment, if at all, which were adopted by the learned judge in his judgment dated 5 September 1989 reproduced earlier on, as the grounds for dismissing the plaintiffs' application dated 23 February 1989 under Originating Summons No D1–24–41–89 are to be found in the two paragraphs where the learned judge said that the removal of directors was governed by s 128 of the Act under which special notice was required of any resolution to remove a director and secondly, where he held that there was non-disclosure on the part of the plaintiffs for the order of injunction against the defendant in his application dated 27 February 1989. The other relevant part of the judgment is in respect of prayer (b) of the plaintiffs' application dated 27 February 1989. The learned judge dismissed the plaintiffs' application in respect of prayer (b) on the ground that the resolution passed at the meetings was not valid and the plaintiffs could not impose the resolution on the defendant. He was also of the view that the balance of convenience was in favour of the defendant and that status quo should be maintained. In dealing with the plaintiffs' application which is the subject of this appeal, the learned judge

adopted the same reasons for dismissing prayer (b) of the plaintiffs' application dated 27 February 1989. A

Since the appellants' application is in the nature of discretionary reliefs, the question for our determination is whether in dismissing the appellants' application the learned judge had exercised his discretion upon some wrong principle of law, or that the decision results in injustice being done, or the learned judge had not given weight or sufficient weight to relevant considerations in order to justify us to interfere with the learned judge's exercise of discretion. (See *Evans v Bartlam*[2] and *Osenton (Charles) & Co v Johnston.*[3] No doubt, it is always a difficult and delicate matter for us in the Supreme Court to interfere with an order made by a judge in the exercise of his discretion but in proper cases it is the duty of the appellate court to do so. This is settled law. Lord Diplock in *Hadmor Productions v Hamilton*[4] at p 325 expressed the proposition in so clear, succinct and lucid language that there cannot be any misapprehension as to what he meant. The relevant passage of his judgment reads as follows: B C

> The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own. D E F

Bearing in mind that the appellants' main action is based on Originating Summons No D1–24–121–89 and that the hearing before the learned judge is only an application under this originating summons for an interim injunction, the learned judge, in our view, should not have dealt with the application in such a manner so as to give the impression in his judgment that he had in fact disposed of the originating summons itself on its merits based on the affidavits of the parties to the application. It is necessary to bear in mind in an application for an interim injunction that the court is not called upon to make any final decision on any question of fact. What is relevant and required at that stage is for the learned judge to decide on the affidavits available before him that the claim in the originating summons is not frivolous or vexatious; in other words, that there is a serious question to be tried and having so decided he must go on to consider the question of balance of convenience. In this regard it is pertinent to quote a passage from Lord Diplock's judgment in *American Cyanamid v Ethicon*[5] appearing at p 510 where he said: G H I

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (*Wakefield v Duke of Buccleuch* (1865) 12 LT 628 at 629.) So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

Regrettably, the learned judge apparently did not apply these guidelines in dealing with the application but had given weight to irrelevant considerations not in any way connected with this application and had plainly and erroneously given no weight to relevant considerations, having regard to the materials in the affidavits before him.

At the risk of being repetitive, in the instant case the learned judge in dismissing the appellants' application basically relied on the facts as he found them from the affidavits of the respondent and counsel's argument in the application under Originating Summons No D1–24–41–89 that as the removal of a director of a company was governed by s 128 of the Act where special notice was required of any resolution to remove a director, the removal of the respondent as such was not valid for non-compliance with the provisions of the section. Secondly, the learned judge agreed with counsel for the respondent that the appellants failed to disclose to the court when applying for the interim injunction under Originating Summons No D1–24–41–89 that the notice of the board of directors meeting held on 31 January 1989 was never given to the respondent. The non-disclosure of these facts, therefore, entitled the respondent to set aside the interim injunction dated 27 February 1989. The decision ostensively is partly based on facts and partly on the learned judge's construction of s 128 of the Act. Without qualification the learned judge erroneously adopted this as the grounds in the judgment of the application under that originating summons. How the learned judge could adopt the judgment in the application under Originating Summons No D1–24–41–89 to an application under Originating Summons No D1–24–121–89 where different considerations applied and different arguments were advanced is beyond our comprehension. Neither did the respondent ever raise these issues in his affidavits dated 29 April 1989 and 11 May 1989 in opposition to the application although it was raised in the respondent's affidavit in relation to other applications.

In his affidavit dated 29 April 1989 it is evident that the respondent raised the following issues:

(a) That Tien Ik Sdn Bhd, Tien Ik Credit Sdn Bhd and Tien Ik Enterprises Sdn Bhd are all companies in which the ultimate beneficial owners are the five children of Kuok Hock Chin, who includes himself and Bernard Kuok, a

grandson of Kuok Hock Chin, and the companies were created pursuant to a family arrangement, and consequently although the companies exist as separate corporate sole, the actual relationship is akin to that of a partnership. Therefore, he fully expected to be informed and consulted on matters relating to the affairs of the companies as they represent his share of the inheritance.

(b) He also raised the questions:

(i) that the notices issued under art 85(f) of the companies' articles of association of these companies did not in fact have the actual support of the holders of three-fourths of the companies' shareholders; and

(ii) that these notices were issued 'mala fide' as part of a course of oppressive conduct orchestrated by David Kuok and for the ulterior motive of preventing any investigation initiated by him into the companies' affairs.

Therefore, he argued that in view of this relationship existing between the shareholders he had every right to remain a director of the companies. Based on this argument the defendant urged the court to have regard to the underlying relationship between the shareholders by lifting the corporate veil in the interest of justice. In his judgment quoted above the learned judge never dealt with these issues and it is clear in our minds that the learned judge in dealing with this application was influenced by the respondent's affidavit dated 3 March 1989, particularly para 35 thereof where reference to s 128(2) of the Act was made which he deposed to in support of his Petition No D1–26–9–89. This particular affidavit was referred to and made use of by the respondent in his affidavit dated 4 March 1989 in support of his Originating Summons No D1–24–41–89. (See p 165 of Vol One of the record of appeal.) It is abundantly clear, therefore, for the purpose of this application, the two reasons given by the learned judge for dismissing the application are irrelevant matters and should not have been taken into consideration. On these grounds alone and on the welter of authorities on this point, we are justified in interfering with the learned judge's exercise of his discretion, as he has not only given weight to irrelevant considerations but has totally ignored relevant considerations.

In his affidavit dated 21 April 1989 David Kuok affirmed that he was a director of Tien Ik Enterprises Sdn Bhd ('TIE') as well as director of Tien Ik Credit Sdn Bhd ('TIC') and stated that the paid-up share capital of TIE is $1m and held by the following shareholders:

Tien Ik Sdn Bhd	...	$400,000
Woodsville Sdn Bhd	...	$100,000
Parquin Sdn Bhd	...	$100,000
K Crest Sdn Bhd	...	$100,000
Milverton Sdn Bhd	...	$100,000
Bernard Kuok	...	$100,000
Blenheim Sdn Bhd	...	$100,000

Other directors of TIE and TIC are Irene Kuok and Helen Kuok. According to David Kuok, the majority shareholders of TIE and TIC had issued notices pursuant to art 85(f) to the defendant under the respective articles of association of these companies. Art 85(f) of these two companies are identical and are in the following words:

The office of director shall become vacant if the director:

...

(f) shall be required to resign his office by notice in writing lodged at the office signed by the holder or holders of not less than three-fourths in nominal value of the issued shares of the Company.

It may also be said in passing that art 85(e) provides that the office of director shall also become vacant if the director is removed from his office of director by resolution of the company in a general meeting. In the instant case the holders of three-quarters of the shareholding in both TIE and TIC invoked art 85(f) and not (e). Therefore, according to David Kuok in his affidavit the respondent had vacated the office of director of TIE and TIC as from 23 March 1989, namely, the date when the notice under art 85(f) was sent to him. The respondent continued to hold himself out as a director and the executive director of TIE and TIC, respectively, in defiance of that notice to vacate his office. The board of directors of these two companies were unable to effectively carry out the management of TIE as a result of the respondent's obstructive actions against the wishes of the majority. David Kuok gave an account of the urgent problem relating to a company by the name of Tanjong Tin Dredging plc ('TTD') quotation which had been suspended by the London Stock Exchange and if the problem was not effectively dealt with, TIE and TTD would suffer irreparable damage. It was vital for the board of directors to ensure that the respondent did not interfere with their efforts to resolve that problem. Hence, the application for the interim injunction under Originating Summons No D1–24–121–89. These are the grounds upon which the appellants applied for the interim injunction. In our view, these are relevant matters which the High Court ought to take into consideration in dealing with the question whether to give or refuse the interim injunction and all other matters referred to in the affidavits of both parties to the application not intended to be used in this application should be disregarded. Consequently, as the decision of the learned judge to refuse to grant the interim injunction is so aberrant in that it was clearly and indisputably arrived at by the learned judge by giving weight to irrelevant considerations and arguments not relevant to the application, the appeal should be allowed on this ground alone. *Hadmor Productions v Hamilton*[4] and *Evans v Bartlam*.[2]

However, in an application for interim injunction it is for the appellants to satisfy the court that there are serious issues to be tried and that the whole solvency of the parties is not in doubt. They also have to convince the court that the balance of convenience is in their favour. We have studied the corporate chart referred to by David Kuok in his affidavit and we are satisfied, giving the affidavit its face value, that indeed not less than three-quarters of the shareholders of these companies had, pursuant to art 85(f), required the respondent to vacate his office as director of TIE and executive director of TIC. As for the allegation of mala fide of that notice, we are of the view that even if the allegation can be proved, it does not affect its validity, since art 85(f) is so drafted as to require the respondent to vacate his office as director and executive director, respectively, of the two companies once he had been requested to do so by not less than three-quarters of the shareholders of these companies. In support of this view we accept

the authority of *Lee v Chou Wen Hsein & Ors*[6] cited by counsel for the appellants.

Both in the High Court and before us the question of the adequacy of damages or the solvency of the parties was never argued and we can assume that these matters are not seriously in dispute. We should then consider the question of balance of convenience. In this respect, counsel for the appellants appeared to be contented with his proposition that since the appellants had established that there were serious issues to be tried and that the respondent had no valid defence to the application, the appellants having succeeded to establish that they had complied with art 85(f) and the respondent's submissions as to the applicability of s 128(2) of the Act to the application having no substance, the appellants should be granted the interim injunction.

Counsel for the respondent argued that the balance of convenience did not arise in this case, citing the English Court of Appeal case of *Cayne v Global Natural Resources plc.*[7] It is not correct to say, if that is what the respondent intended to impress upon us, that *Cayne*'s case[7] is an authority of general application in cases where the question of balance of convenience does not apply. The facts of *Cayne*'s case[7] are nowhere near or identical with those in the instant case and decisions in general terms should not be applied when the facts of cases vary infinitely. In *Cayne*'s case[7] it is clear on the facts that the grant or refusal of the interlocutory injunction at that stage would effectively dispose of the action whereas *Cyanamid*'s case[5] is based on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined. We do not think *Cayne*'s case[7] is of any assistance to the respondent as it can be clearly and easily distinguished on the facts. We bear in mind that the application for an interim injunction is merely a holding operation pending the trial of the Originating Summons No D1–24–121–89 and that since the trial of this action is to be pursued, the guidelines in *Cyanamid*'s case[5] would apply.

David Kuok in his affidavit complained that the respondent continued to hold himself out as director and executive director of TIE and TIC, respectively, in spite of the notice under art 85(f) and had been obstructive in the management of the affairs of the two companies. For example, he interfered with the conduct of the business pertaining to the management of the affairs of TTD although this allegation was denied by Peter Kuok in his affidavit of 29 April 1989. He in fact claimed that he was assisting in the management of the company after David Kuok had made a mess of it. In view of the contest of affidavit evidence, the relevant question we have to ask ourselves is, would it cause injustice to the appellants if the interim injunction is refused, or to put it in another way, what good will be done to the appellants by the grant of the interim injunction sought.

There must be some truth in the appellants' allegation of the respondent's interferences with the conduct of the affairs of the two companies or else there was no need for the originating summons and the interim injunctions and, besides, the respondent himself also complained of the oppression of the minority by the majority shareholders to justify his interference. The respondent must realize that even without the interim injunction the management of the two companies is vested in the board of directors and

that to discharge their duties as board of directors they need only a quorum of two at the board of directors' meetings. This is clearly stated in the articles of association of the two companies, and if these two companies are to be managed in accordance with the provisions of the Companies Act and their articles of association then the respondent must abide by the decision of the majority even if the respondent feels aggrieved that the decision of the majority is always carried to his detriment at the meetings of the board of directors. These are the realities of life and so long as the businesses of the two companies are legally and appropriately conducted the respondent must come to terms with the present law and practice until the Act is amended to protect minority rights. If the respondent is not restrained by an interim injunction it would seem obvious that he would continue to intermeddle with the despatch of the business of the two companies believing in his own conviction that he had been oppressed by the majority of the board of directors. It is to prevent further interferences and all manner of obstructions by the respondent, that the originating summons and the injunction become inevitable. In our view, no injustice is done to the respondent by the grant of the interim injunction since even without the injunction the board of directors can still function though perhaps with less effectiveness, considering that the respondent may spitefully refuse to abide by the decisions of the board of directors and make available all the necessary documents which are in his possession, relating to the affairs of the two companies, particularly at a stage of their dispute where the animosity between them had reached an extreme and bellicose level. That the respondent might have assumed a recalcitrant attitude towards the other members of the board of directors can be inferred from prayer (b) in the application which seeks an order that the appellants be enabled to obtain possession of and control over certain books, documents, cash and other properties of the two companies. The interim injunction would no doubt put an end to the efforts of the respondent to intermeddle with the affairs of the company and to render the functions of the board of directors ineffective by refusing to produce the documents belonging to the companies. If he feels that an injustice has been done to him by the issue of the interim injunction, the injustice would perhaps be in the form of frustrations on his part in not being able to impose his will on the board of directors and the delusion of being oppressed by the majority with which he appeared to be obsessed. Surely, if there is any inconvenience that he might have suffered by the injunction and if that inconvenience can be recompensed in terms of money the appellants are in a financial position to do so. In the result, we consider that the balance of convenience is weighted in favour of the grant of the injunction.

As the second limb to her arguments counsel for the respondent submitted that s 128(2) of the Act applied to the removal of the respondent as director of the two companies. As the special notice, which in her view was a mandatory requirement before the removal of a director was to be effected was not given, the respondent was not obliged to vacate his office in the two companies. The respondent's argument, with respect, dangerously borders on the proposition that, notwithstanding the articles of association, no director under any circumstances may be removed from office unless made

under and in compliance with the provisions of s 128(2), even in cases where the removal was not by way of resolution and, although as we have said earlier on, this defence was never raised by David Kuok in his affidavits in opposition to this application, it was accepted by the learned judge out of the confusion arising from having to hear all the applications together as the ground for dismissing it, we should ignore it altogether as being an irrelevant consideration. However, since this issue was argued by both counsel before us, we consider it appropriate to express our view on the applicability of this section to the instant case. Counsel for the appellants submitted that s 128(2) did not apply to a private company as is the case here, quoting the footnote at p 383 of Wallace and Young *Australian Company Law and Practice* which says that unlike the English provision which applies to all companies it only applies to public companies, and that in any case the decision of *Solaiappan v Lim Yoke Fan*[8] applied to the present case.

On a proper construction of s 128(2), we do not agree that it applies to the removal of a director by notice under art 85(f) under which the respondent was required to vacate his office as director of the two companies but may apply to cases where the director is removed by a company by a resolution. Section 128(2) was drafted in clear and categorical language and is intended in our view to apply to a case of the removal of a director by a resolution at the meeting of the company at which he is removed. It is clearly applicable in the case of the removal of the respondent as executive director and/or chairman of TIE, TIC, TI and Giltspur Holdings Sdn Bhd which is the subject matter of Originating Summons No D1–24–41–89. For purpose of convenience, s 128(2) is hereby reproduced:

> Notwithstanding anything to the contrary in the memorandum or articles of the company special notice shall be required of any resolution to remove a director or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

Article 85 provides several ways by which a director may lose his office, and for the purpose of this appeal it would suffice to refer to paras (e) and (f) of the articles to show the clear distinction between the methods of removal of a director under each paragraph. These paragraphs are worded in unequivocal language, drawing clear distinction between removal of the director by resolution of the company in a general meeting under para (e) and his removal by notice in writing lodged at the office, signed by the holder or holders of not less than three-fourths in nominal value of the issued shares of the company under para (f). Article 85(e) and (f) read:

> 85 The office of director shall become vacant if the director:
>
> ...
>
> (e) is removed from his office of director by resolution of the company in general meeting;
>
> (f) shall be required to resign his office by notice in writing lodged at the office signed by the holder or holders of not less than three-fourths in nominal value of the issued shares of the company.

A Since s 128(2) deals with removal of a director by a resolution at a meeting of the company, the irrefragable conclusion is that art 85(f) falls outside the scope of this section. It is worthwhile to mention here also that from what we gather from the jumble of the notes of proceedings, s 128(2) was only raised in relation to the application under Originating Summons No D1–24–41–89 as can be clearly gleaned from pp 92, 98, and 100 of Vol One of the record of appeal. On this ground the counsel for the respondent's arguments must fail.

B

For the foregoing reasons we would allow this appeal with costs here and below. The order of the High Court is set aside. There will be an order in terms of prayers (a) and (b) of the application. The deposit is to be C refunded to the appellants.

Appeal allowed.

Reported by Prof Ahmad Ibrahim

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